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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 92-77
Billed Party Preference	)	Phase I
for 0+ InterLATA Calls	)	

SUPPLEMENTAL COMMENTS OF CAPITAL NETWORK SYSTEM, INC.

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SUMMARY

Based on the Commission's own conclusions that AT&T's flooding the market with CIID cards has created "an immediate competitive problem," that this AT&T-created problem has forced competitors "to devote their facilities to uncompleteable and therefore unbillable CIID card calls," and that this problem "cannot be eliminated unilaterally by AT&T's competitors," the Commission erred in not implementing "0+ public domain" and ordering AT&T to use proprietary access codes for its proprietary CIID cards.

Nevertheless, pending judicial review of the FCC's decision rejecting "0+" public domain, CNS strongly urges the Commission to require AT&T to compensate OSPs immediately for the costs of providing transfer services to AT&T. CNS has been seeking such compensation since at least June 1991 when it filed a tariff with the Commission proposing its Interstate Common Carrier Transfer Service. Because of the importance of this problem and the long delay that has transpired in providing compensation for the ongoing costs that have been incurred to provide the services, it is critically important that the Commission ensure that compensation begins immediately.

At present, there are apparently four different types of transfer services which could be implemented with current equipment and technology. Two of the services involve OSPs providing information to CIID cardholders on how to access AT&T, and two involve OSPs physically transferring the CIID cardholders' calls. In view of the lengthy period during which OSPs have been required, as a practical matter, to provide these services without compensation, the FCC should immediately order compensation on a carrier-specific basis for all currently feasible transfer services and let OSPs decide themselves which services to provide.

CNS is guardedly optimistic that FCC-supervised industry negotiations will lead to a compensation solution through carrier-filed contracts or tariffs. Although the Commission rejected CNS's proposed transfer tariff citing issues concerning the mode of subscription and verification, based on developments at recent industry meetings both of these issues may be capable of quick resolution if AT&T agrees voluntarily to subscribe to a transfer tariff and work out verification procedures on a mutually agreeable basis. Thus, consensus on either a tariff or contract-based solution is possible. If, however, industry negotiations do not produce satisfactory solutions by the end of the comment period, then the Commission must resolve any outstanding issues promptly. In doing so, the Commission, having in mind its conclusions concerning AT&T's causation of the problem and the fact that AT&T has the means to

address the problem through its own consumer education efforts, should place a heavy burden on AT&T if AT&T challenges the feasibility, cost recovery levels, or other implementation aspects of an OSP's compensation program.

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Capital Network System, Inc. ("CNS"), by its undersigned attorneys, hereby submits its supplemental comments in support of the proposal contained in the Report and Order and Request for Supplemental Comment issued in the above-captioned proceeding [1] to compensate operator service providers ("OSPs") who continue to receive "0+" access calls from cardholders of American Telephone and Telegraph Company's ("AT&T") proprietary Card Issuer Identifier ("CIID") cards.

I. INTRODUCTION

1. Compensation should be mandated immediately because AT&T's choice of a non-proprietary "0+" access method for its proprietary CIID calling cards causes carriers such as CNS to bear the substantial costs of receiving and handling thousands of telephone calls from AT&T CIID cardholders every day. The Commission should promptly order compensation for all transfer services and let individual OSPs be compensated for whichever

[1] Billed Party Preference for 0+ InterLATA Calls, FCC 92-465, CC Docket No. 92-77, Phase I (released November 6, 1992) ("Request").

transfer services they choose to provide. [2] OSPs incur a variety of substantial -- yet currently uncompensated -- expenses because of these CIID calls. The nature and amount of the expenses OSPs incur depends on a variety of factors, but (as discussed below) there are basically four different scenarios in which OSPs incur uncompensated expenses as a result of CIID card calls reaching their networks. Two involve what may be characterized as informational transfers, and two involve actual or "physical" transfers -- but all involve the incurrence of substantial costs by OSPs.

2. Regardless how an "0+" proprietary call reaches an OSP's network and regardless of how the OSP handles the call, one factor remains constant: under the current regulatory and marketing environment, OSPs must provide these informational and transfer services and, therefore, cannot avoid the associated costs. OSPs like CNS cannot refuse to provide these services because of the substantial customer confusion and inconvenience that would result. As the Commission has recognized, this customer confusion and inconvenience is used by AT&T affirmatively as a marketing ploy to dissuade aggregators from using the services of competitive non-AT&T OSPs. [3] Additionally, OSPs are prohibited by law from recovering the

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[2] As industry developments make new OSP transfer services possible, the Commission should mandate compensation for them as well.

[3] <u>Request</u> at para 25.

transfer costs from the consumers placing these calls. [4] Thus, AT&T is taking advantage of the current regulatory environment to implement an anti-competitive business strategy of increasing substantially its competitors' costs by forcing them to provide informational and call transfer services without compensation. [5] CNS believes that the Commission must require AT&T immediately to compensate OSPs for their costs in providing these services.

II. THE FCC CORRECTLY IDENTIFIED THE HARMS CAUSED BY "0+" PROPRIETARY CARDS BUT CHOSE THE WRONG MEANS TO REDRESS THEM

3. In its Request, the Commission described the severe economic hardship imposed on competing OSPs by AT&T's business decision to flood the market with "0+" proprietary calling cards. As acknowledged by the FCC, only AT&T has a large enough market share of presubscribed public phone lines to "issue a proprietary card that is usable with 0+ access at a sufficient number of public phones to make its card marketable and workable as a 0+ proprietary card." [6] The effect of AT&T's business strategy is to create "an immediate competitive problem" for AT&T's competitors, who are "forced to devote their facilities to uncompleteable and therefore unbillable CIID card calls" and who

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[4] See 47 U.S.C. §§ 226(b)(1)(F) and (G).

[5] Raising one's rivals' costs is a well-known anti-competitive strategy used by companies to attempt to drive others from the market. See Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

[6] Request at para. 20.

suffer "a loss of customer good will" because they are unable to complete the calls. [7] Moreover, the Commission concluded that "[t]his problem cannot be eliminated unilaterally by AT&T's competitors." [8]

4. Despite its clear understanding of the "immediate competitive problem" faced by OSPs as a direct result of AT&T's action, the Commission refused to take the necessary action to remedy the competitive balance, i.e., to require AT&T to use proprietary access codes for its proprietary CIID card. Instead, the FCC opted to rely on a "consumer education program" [9] that surely will not fully or effectively address the competitive problem the Commission itself recognizes. CNS believes that the Commission erred in failing to adopt appropriate measures to address the competitive problems created by AT&T, and CNS has filed a petition for review of the Commission's decision. [10] Nevertheless, pending judicial review of the FCC's refusal to implement "0+ public domain," CNS strongly supports the concept of OSP compensation -- a concept CNS originated in at least one

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[7] Id. at para. 25.

[8] Id.

[9] The FCC required AT&T to (1) educate its cardholders to check public phone notices and use "0+" access only from phones presubscribed to AT&T; (2) provide clear and accurate access code dialing instructions on its CIID cards; and (3) establish and promote use of a "800" access number that provides immediate access to operator services. Id. at paras. 55-57.

[10] See CNS's "Petition for Review," D.C. Cir. No. 92-1627, (filed December 3, 1992).

form in June 1991 when it filed its transfer tariff with the Commission. [11]

III. OSPS SHOULD BE FULLY COMPENSATED FOR PROVIDING INFORMATIONAL AND CALL TRANSFER SERVICES TO CIID CARDHOLDERS

5. The Commission should require AT&T to compensate other OSPs for the activities associated with handling and transferring CIID card calls which reach their networks. Such compensation should be paid for whichever of the following four general types of transfer services an OSP provides and for any other type of transfer service that become available in the future.

6. First, as the Request recognizes, AT&T's instructions to its customers to "dial 0+ and hang up if you do not hear AT&T" impose substantial costs on OSPs. [12] Even if a CIID caller hangs up at the first bong tone in accordance with AT&T's

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[11] CNS's tariff for Interstate Common Carrier Transfer Services proposed to establish a charge of $1.50 per transfer to recover from other common carriers the costs incurred by CNS in transferring to them interstate telephone calls initiated by callers who place operator-assisted calls, reach CNS's operator center, and insist on charging their telephone calls to calling cards that the issuing carriers do not allow CNS to validate.

The Commission recently affirmed the Common Carrier Bureau's September 1991 rejection of this tariff. Capital Network System, Inc., Tariff F.C.C. No. 2, Transmittal No. 1, Memorandum Opinion and Order, FCC 92-512 (released December 2, 1992) ("Order"). The Commission released its decision two weeks after CNS petitioned the D.C. Circuit for a writ of mandamus directing the FCC to decide the Application. See CNS's "Emergency Petition for Writ of Mandamus," D.C. Cir. No. 92-1598 (filed November 17, 1992). CNS has petitioned the D.C. Circuit for review of the Commission's Order affirming the Bureau's rejection of CNS's tariff. See "Petition for Review," D.C. Cir. No. 92-1640 (filed December 9, 1992).

[12] See Request at paras. 16, 25.

instructions, OSPs still incur access charges and use switch time to process the call. Moreover, the volume of caller "hang ups" at the first bong tone have escalated since AT&T began telling its cardholders to hang up when they hear the name of competing OSPs. Because AT&T's instructions and substantial advertising campaign have the effect of triggering callers to remember AT&T's marketing slogan to dial "10ATT" once they hear an OSP's bong tone, the OSP's actions, in effect, provide necessary information to allow CIID cardholders to reach AT&T. Even though this type of activity is different from the activities discussed below, the OSP is incurring costs as a direct result of AT&T's CIID card marketing efforts, and there is no reason why the OSP should not be compensated just as it should in the situations described below.

7. The second type of service occurs when AT&T's CIID cardholders do not hang up at the bong tone, but instead stay on the line. Because these cardholders' calls cannot be billed to their CIID cards, OSPs instruct these callers how to access AT&T. These informational transfers result in substantial costs to OSPs resulting from the use of access and transport facilities, the OSPs' switches and other facilities, and usually operator time as well. These services are more costly than the first type of informational transfer discussed above, especially when they require live operator intervention such as when callers do not input their calling card numbers.

8. Third, some OSPs, including CNS, choose, where possible, to transfer "0+" proprietary calls to local exchange companies ("LECs") for reorigination to AT&T. [13/] The direct expenses CNS incurs to provide this transfer service include the LEC access and transport charges, the CNS operator time spent handling the call, the cost of switching capacity used throughout the process of handling the call, the cost of validating the customer's calling card or otherwise determining whether the call can be properly billed to the card, and the costs of transporting the call back to the originating location for connection to the interexchange carrier. [14/] Indeed, the FCC acknowledged in the Request that AT&T's actions were apparently costing CNS "$100,000 to $200,000 per month in out-of-pocket costs" [15/] for this particular transfer service alone. While AT&T receives the revenue for the completed calls that CNS transfers to it, CNS currently receives no compensation for its services.

9. Fourth, certain OSPs may be able to transfer calls directly to AT&T. This type of transfer is, by its very nature,

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13/ This type of transfer service satisfies the anti-splashing provision of the Operator Services Act because the transfer is provided at the originating location of the call and therefore the call is billed from the originating location. See 47 U.S.C. § 226(b)(1)(H). It was this type of reorigination transfer that was the subject of CNS's proposed tariff for Interstate Common Carrier Transfer Services. See supra note 11.

14/ Based on a cost study performed by CNS in September 1992, its costs for transferring each misdirected call are $1.47 per call. This figure is consistent with an earlier cost study performed by CNS at the time it proposed its tariff with a charge of $1.50 per transfer.

15/ Request at para. 35 n.54.

the most expensive type of transfer service because, in addition to the costs incurred for the reorigination transfer, the OSP's facilities are used as a type of "bridge" and are in use during the entire duration of the call. Therefore, while a flat rate per call transfer likely is appropriate for ease of administration for the first three types of transfer, a usage-sensitive charge may be more appropriate if OSPs are able to utilize the fourth type of transfers.

10. OSPs should be compensated for whichever of these transfer services they provide -- whether they provide call branding information that the caller has not reached AT&T, whether they advise a caller how to reach AT&T by actually providing dialing instructions, or whether they physically transfer the call to a LEC or AT&T operator. While the technical/operational issues may differ somewhat depending on the type of service being provided, OSPs' need to recover the costs caused by AT&T remains constant in each situation.

IV. EITHER CONTRACT OR TARIFF MAY BE AN APPROPRIATE COMPENSATION MECHANISM

11. Compensation should be provided by whichever method -- contract or tariff -- that can be implemented most promptly, consistent with full cost recovery. If, however, the industry has not developed a solution by the end of the comment period in this proceeding, then the Commission must promptly decide the pertinent issues and order compensation to be paid and require

AT&T to agree to contracts or subscribe to tariffs. [16/] Moreover, compensation for the use of one carrier's facilities by another carrier should be paid on a carrier-specific basis. [17/]

12. Despite the Commission's recent denial of CNS's long pending "Application for Expedited Review" of the Bureau's rejection of its transfer tariff, [18/] CNS believes that, given developments at recent industry meetings, tariffs represent an appropriate alternative to contracts. In rejecting CNS's tariff to establish a $1.50 per call charge for its reorigination call transfer services, the Commission focused on two issues: first, that CNS would treat carriers not affirmatively ordering the services as its "customers", and second, that call auditing might not necessarily show that the customer had received all the transferred calls for which it was being charged. [19/] Based on AT&T's representations at recent industry meetings, however, CNS believes that a resolution of these issues may be possible even on a consensus basis, but, if not, the Commission should exercise its authority to decide the issues promptly.

16/ See Bell Tel. Co. of Penn. v. FCC, 503 F.2d 1250, 1273-74, 1277 (D.C. Cir. 1974), cert. denied, 422 U.S. 1026 (1975), for a discussion indicating that interconnection between carriers may be achieved either by means of Section 203 tariffs or contracts filed pursuant to Section 211 of the Act.

17/ See MTS/WATS Market Structure, Phase I (Third Report and Order), 93 FCC 2d 241, 244, 246 (1983) (subsequent history omitted).

18/ See Order at para. 12, petition for review pending.

19/ See id. at paras. 9, 11.

13. AT&T's apparent willingness now to subscribe voluntarily to tariffs for OSP informational and call transfer services may eliminate the first issue. In any event, and more fundamentally, AT&T's willingness to "order" service from an OSP tariff on a voluntary basis is no longer relevant, because, in the context of this proceeding, presumably the Commission is going to mandate that AT&T subscribe to these OSP services if it determines compensation is appropriate. [20/]

14. With respect to the second issue, which concerns verifiability, AT&T stated that, in order for it to "audit" the bills it will receive from OSPs for information and call transfer services, it would need only four types of call information: (1) the first six digits of the originating line number, (2) the caller's CIID card number (if the caller was seeking to use its CIID card), (3) the date of the call, and (4) the time of the call. As the Commission is aware, OSPs such as CNS have always been willing to provide such information to interexchange carriers. As a result, this "issue" appears to be subject to resolution as well. Accordingly, no substantive objections remain to tariffing OSP services.

[20/] Pursuant to Section 201 of the Act, the Commission has ample authority to require AT&T to subscribe to transfer tariffs. This is so, of course, despite any previous contentions by AT&T that "it had no intention of participating in a 'through service' . . . ." <u>See</u> <u>Bell Tel. Co. of Penn. v. FCC</u>, 503 F.2d at 1256. AT&T's obligations in this regard do not mean, however, that the rate levels and other terms and conditions of an OSP's transfer service tariff are not subject to Commission review under the appropriate procedures and standards.

15. CNS is hopeful that the FCC-supervised industry negotiations may lead to a prompt consensus, at least concerning payment of compensation for the activities identified in these comments. If not, the Commission should be prepared to resolve the issues in this proceeding on a very expedited basis. Because AT&T has deliberately and unilaterally imposed a variety of costs on its competitors through the unwarranted receipt of CIID card calls, the Commission should give OSPs the benefit of any doubts when resolving any disputed issues such as verifiability of the appropriate level of compensation. Based on the Commission's conclusion that AT&T has created an "immediate competitive problem" that "cannot be eliminated unilaterally by AT&T's competitors," 21/ and its determination that a consumer education program by AT&T is the appropriate manner to address the problem, 22/ AT&T should bear a heavy burden in challenging the feasibility, cost recovery levels, or other implementation aspects of an OSP's compensation tariff or contract.

21/ Request at para. 25.

22/ Id. at paras. 55-57.

V. <u>CONCLUSION</u>

16. Until the underlying FCC decision rejecting "0+ public domain" is reversed, CNS endorses the current proposal to compensate OSPs who receive "0+" proprietary card calls.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joan T. Prouty, hereby certify that a copy of the foregoing Supplemental Comments of Capital Network System, Inc. has been served by hand this 14th day of December 1992 on the following:

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